

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDITH A. WHYTE,

Plaintiff,

CIV. S-02-2264 DFL PAN PS

v.

UNITED STATES DEPARTMENT OF
VETERANS AFFAIRS, et al.,

FINDINGS AND RECOMMENDATIONS

Defendants.

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Plaintiff commenced this suit October 16, 2002, against the U.S. Department of Veterans Affairs, five members of the Villa San Juan Homeowners Association, Riverside Property Management, and several individuals alleging undisclosed pre-existing defects in the condominium she purchased from the Department of Veterans Affairs. Defendant Shaw, the selling agent and only remaining defendant, answered the complaint November 15, 2002.

On January 22, 2003, this court dismissed plaintiff's claims

1 against the Homeowners Association and its board members, and
2 against the Riverside Property Management and its manager,
3 Celeste Cummings. On July 11, this court directed plaintiff to
4 serve process upon the United States and defendant Osborne.
5 Plaintiff did not respond and this court recommended dismissal of
6 these defendants, which was ordered by Judge Garcia on January
7 12, 2004. Thereafter, plaintiff served the United States and
8 filed the return of service on February 11, 2004. Pursuant to an
9 order to show cause issued May 10, this court on June 29 ordered
10 plaintiff to pay \$350 sanctions for serving a complaint
11 containing claims she knew had been dismissed. Plaintiff paid
12 the sanction on July 14.

13 On March 15, 2005, this court ordered plaintiff to file a
14 joint status report prepared in cooperation with remaining
15 defendant Shaw. Plaintiff was warned that failure to comply with
16 the court's order may result in a recommendation of dismissal.

17 The 30-day period for filing the joint status report
18 expired April 14. Plaintiff neither filed a report nor otherwise
19 communicated with this court until May 10, when she filed a
20 motion for summary judgment against Shaw asserting simply that
21 Shaw's answer should be construed as a motion to dismiss
22 conceding all allegations of the complaint.

23 Fed. R. Civ. P. 41(b) allows dismissal for "failure of the
24 plaintiff to prosecute or to comply with these rules or any order
25 of court . . ." A federal district court has the inherent
26 power to dismiss a case *sua sponte* under Rule 41(b). Link v.

1 Wabash R. Co., 370 U.S. 626, 630-32 (1962). Dismissal is also
2 authorized by Fed. R. Civ. P. 16(f) (dismissal appropriate "[i]f
3 a party . . . fails to obey a scheduling order or pretrial
4 order"); and E. D. Cal. L. R. 11-110 ("Failure of . . . a party
5 to comply with these Rules or with any order of the Court may be
6 grounds for imposition by the Court of any and all sanctions
7 authorized by statute or Rule or within the inherent power of the
8 court").

9 Plaintiff's pro se status does not derogate this authority.
10 "Any individual representing himself or herself without an
11 attorney is bound by the Federal Rules of Civil or Criminal
12 Procedure and by these Local Rules. Failure to comply therewith
13 may be ground for dismissal, judgment by default, or any other
14 sanction appropriate under these Rules." E. D. Cal. L. R. 83-
15 183.

16 Dismissal, however, is a harsh penalty and should only be
17 imposed in extreme circumstances. See Ferdik v. Bonzelet, 963
18 F.2d 1258, 1260 (9th Cir. 1992). In determining whether to
19 dismiss a case under Rule 41(b), district courts must weigh five
20 factors: "(1) the public interest in expeditious resolution of
21 litigation; (2) the court's need to manage its docket; (3) the
22 risk of prejudice to the defendants; (4) the public policy
23 favoring disposition of cases on their merits; and (5) the
24 availability of less drastic sanctions." Malone v. United States
25 Postal Service, 833 F.2d 128, 130 (9th Cir. 1987) (failure to
26 comply with court order); Henderson v. Duncan, 779 F.2d 1421,

1 1423 (9th Cir. 1986) (failure to prosecute). Dismissal is proper
2 when at least four factors support dismissal or where at least
3 three factors "strongly" support dismissal. See Hernandez v.
4 City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998).

5 The first two factors weigh strongly in favor of dismissal.
6 Plaintiff's previous failures in complying with this court's
7 directives, her failure to file a joint status report, and her
8 untimely and entirely meritless motion for summary judgment
9 indicate plaintiff would continue to disobey judicial
10 instructions (e.g., a scheduling order) if given the opportunity.
11 Plaintiff's actions have impeded, and by all indications would
12 continue to impede, ordered resolution of this case.

13 Dismissal is also strongly warranted under the third factor.
14 Plaintiff's failure to cooperate and dilatory conduct prejudice
15 Shaw. Despite Shaw's timely answer in this matter, the case has
16 languished for two and one-half years. "Unreasonable delay
17 creates a presumption of injury to the defense." Henderson, 779
18 F.2d at 1423.

19 The fourth factor generally weighs against dismissal based
20 on the strong public policy favoring resolution of claims on
21 their merits. Dahl v. City of Huntington Beach, 84 F.3d 363, 366
22 (9th Cir. 1996). In this case, however, plaintiff's own actions
23 have defeated resolution of her claims on whatever unlikely merit
24 they may have considering the infirmity of her claims against
25 other defendants. See Valley Engineers, Inc., v. Electrical
26 Engineering, 158 F.3d 1051, 1056-57 (9th Cir. 1998). Thus, this

1 factor is outweighed by the factors supporting dismissal.

2 The fifth factor, availability of less drastic sanctions,
3 also weighs strongly in favor of dismissal. The court accorded
4 plaintiff the opportunity to continue prosecuting her case, which
5 she ignored. Monetary sanctions are infeasible; excluding claims
6 or disallowing evidence are similarly inappropriate.

7 Accordingly, I recommend plaintiff's motion for summary
8 judgment be denied and this action be dismissed pursuant to Fed.
9 R. Civ. P. 41(b).

10 These findings and recommendations are submitted to the
11 Honorable David F. Levi, the United States District Judge
12 assigned to this case. 28 U.S.C. § 636(b)(1). Written
13 objections may be filed within ten days after being served with
14 these findings and recommendations. The document should be
15 captioned "Objections to Magistrate Judge's Findings and
16 Recommendations." The failure to file objections within the
17 specified time may waive the right to appeal the District Court's
18 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 Dated: May 18, 2005.

20 _____/s/ Peter A. Nowinski
21 PETER A. NOWINSKI
22 Magistrate Judge
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